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LA RUDE VITA, LA DOLCE GIUSTIZIA; OR HARD CASES CAN MAKE GOOD LAW*

ROGER J. TRAYNOR†

IN AN age of transition from the values of many small worlds to the inchoate values of one small world, the dramatic arts that edit life are shifting from wooden to wormwooden formula. Yesterday's vogue featured mobs at large or glass-eyed duos deadlocked in dim dialogue as night falls. Today's vogue features casually paired sleepyheads who mutter instant philosophies to the four walls as day breaks. What the old slices of life had was monotony. What the new slices of life have is monotony *espresso.*

These works of artfulness offer us all too simple escapes from involvement with the problems tossed up by the times. One must look elsewhere for a whole view of life. Sensitive observers may find it in the vitality of the unrehearsed conflicts that proceed to a courtroom as unexpected and varied as ever. They see that a judge approaches each day's sequence warily, on guard against preconceptions, and they come to understand why. *Dolce dolce arrivano le complicazioni provocative della rude vita.*

The judge in the court of last resort, surveying the endless new arrivals in the line of provocative complications, knows the chronic overriding difficulty of resolving each conflict in three tenses. He knows the theme song of the sages that the decision for today must consort harmoniously with the depreciating language of the past and anticipate also the concepts of the future. *Bene*; but the sages are not around to help him now. As continuity editor of a hodgepodge of materials he must be alert to the exaggerations and understatements of the script writers as he distills the plot from their thick adversary versions of what is past and not forgotten but unfortunately distorted by the tricks of memory. He has somehow to restate the conflict in nonpartisan terms.

* An address delivered at the University of Chicago Law School, October 3, 1961.

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The difficulty of settling hodgepodge materials down to order is aggravated by the disorder of their appearance. No wonder a judge dreams of a calendar that will never be. It would bring him a springtide of contract cases presenting modest ambiguities that give promise of being resolved by reference to age-old local customs. There would follow a long summer of property cases, preferably not involving percolating waters or submerged lands or caves or oil leases. Then would come autumn, *alla breve ma non agitato*, a harvest of torts involving minor injuries to plaintiffs who were feeling no pain and suffering. Finally there would be the welcome winter of hibernation, of puzzling out whether the beneficiary of a will, A.B.C. Smith, was the nephew whom testator always took to baseball games or the nephew who always took testator to baseball games, unless perhaps he was the gardener. Attached to the dream calendar would be a supplementary year for one tax case and one conflicts case, free of any entangling alliances with marriage or divorce.

The actual calendar is a nightmare of disjointed sequences, hindering the very concentration it demands whenever abundant litigation tosses up a problem ridden with complications. Its inevitable disorder, however, is not the sole challenge a judge must meet. If he is responsive to the demands of his job, he must also explore the possibilities that hard cases can make good law more often than they do now.

I have in mind, not the proverbial hardship cases that we say make bad law if they are sentimentally decided in violence to a clearly applicable rule of law, but those hard cases that could plausibly go either way. Too often the very plausibility of the alternatives, making it difficult to choose between them, causes a judge to shun the difficulty by an all too facile decision based on inadequate grounds. However acceptable the immediate result may fortuitously be, the failure to articulate why it should be is apt to engender confusion in the law. The failure can be garrulous as well as incomplete articulation or even a pedantically misleading elaboration; the stated grounds may be dangerously broad or hopelessly narrow.

The leeways in the law that enlarge a judge's freedom beyond that of a mere legal mechanic enlarge also his responsibility. He meets the challenge of the leeways, not by drifting within their accommodating amplitude, but by bestirring himself to give the direction that will keep the law closest to its true course. Karl Llewellyn has some perceptive Llewellynian words for the job. As he states, "[T]here is a duty, case by new case, to rework all language, ancient or recent, into newer, cleaner guidance, a Duty of On-going Judicial Review of Prior Judicial Decision." He rightly reminds us that "a court ought always to be slow in *unchartered* territory, and, in such territory, ought to be narrow, again and again, in any ground of decision. . . . But . . . *once there is clearish light*," he concludes, "a court should make effort to state an even broader line for guidance. And . . . so long as each such line is promptly and overtly checked up and checked on and at need rephrased on each subsequent

occasion of new illumination, such informed questing after broader lines is of the essence of good appellate judging."[1]

From the outset the quest is not easy. Suppose we begin by noting the optimum environment of a hard case in a law office in contrast with its far from optimum environment in an appellate court. Ignoring the averages, let us assume lawyers with the requisite alertness or even mere astuteness for the handling of such a case. We can then also assume they will lavish upon it a solicitude comparable to that a foundling would receive who had the power of rewarding richly whoever established its claims to legitimacy. They will ferret out all the facts they possibly can that have a bearing on the case and in the process jog the memories of many who are prone to be forgetful. They will read the law as they did at law school, in an intensive search for nuggets. They will give high polish to whatever nuggets they find and combine them with skillfully arranged facts. On their good adversary behavior, they will be the narrators par excellence of their client's side of the story and the zealous critics of the opposing side. When they have done with their presentations the court may have before it nothing but the truth, albeit with ingenious inflections.

The terrible question in any hard case is whether the court has the whole truth before it. It can hardly assume adversaries so evenly matched that whatever errors they may have made will have cancelled out and whatever strategies they may have devised will have been countered by like strategies. It can hardly assume adversaries so generous as to have become intelligence agents for one another. It can hardly assume adversaries so dedicated to the public interest as to have volunteered all possible enlightenment to the court even at the risk of an outcome adverse to their clients. However the briefs help a court make its way from outer darkness, they afford it no assurance that it now stands in the innermost circle of light. It may be *in medias res* and still far from the heart of the matter. As Justice Walter Schaefer has noted: "The record must be adequate to raise the issue. But even a record which is technically correct may not cast light on all the aspects of the problem."[2]

Once the adversary shouting has died down and the court is left with the echoes and the pro briefs and the con briefs, it is unhappily mindful of the maxim that solemnly places it above the battle in which it is about to become the deciding factor. A judge assigned to write the opinion in a hard case looks up one morning from his desk to receive the record. Often it closes in on him in gigantesque bundles. Once in a while it is encased in a deceptively slender fagot of papers that slides onto his desk without casting a shadow beforehand. Perforce he looks from the instant case to the calendar and reckons how best to budget for it from finite time and resources.

He wagers time for the latest intruder against the relentlessly moving clock,

[1] LLEWELLYN, THE COMMON LAW TRADITION 389 (1960).

[2] SCHAEFER, PRECEDENT AND POLICY 9–10 (The Ernst Freund Lecture 1955).

knowing that he must work with intense concentration against it to absorb the record as well as the briefs of lawyers who have deliberated the selected facts. He can only hope that the adversaries have been of sufficiently high mind to assemble enough pieces of the complicated puzzle in enough order to enable him to perceive something of its contours and inner patterns. However perceptively he puts the puzzle together, he will be constrained by the number and arrangement of the pieces that each adversary has litigated in the trial court.

Aware though he is of the duality of fact and law, the judge must nevertheless put first things first and begin with rough matters of fact. It is no easy matter-of-fact job. We are wont to attribute adequacy as well as transcedent neutrality to the findings of fact, however inadequate or slanted the disparate presentations of plaintiff and defendant may have been. The very term *findings of fact* misleads us into taking it at face value, when actually it signifies only findings of probability. We tend to forget how unscientific is the reconstruction of a factual situation by lawyers concerned primarily with persuading rather than enlighening the trier of fact. Only recently, with the jury project at the University of Chicago, have we undertaken to find out how rationally triers of so-called fact arrive at their findings.

For all the semantic confusion in representing probabilities as facts, one can nevertheless recognize the common sense in a distribution of responsibility that normally precludes an appellate court from reassessing probabilities that the triers of fact have assessed at close range. The prevailing rule is that it must uphold the trier of fact, given a conflict in the evidence, if there is substantial evidence to support the findings.

The seemingly sensible rule, however, has taken some strange twists. Occasionally an appellate court affirms the trier of facts on isolated evidence torn from the context of the whole record. It thus makes the enormous assumption that a trier of fact who could reasonably believe the isolated evidence reasonably rejected everything that controverted it. Had the appellate court examined the whole record it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover just such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law.[3]

Hence the widespread amplification that there must be substantial evidence to support the findings in the light of the whole record. Unfortunately even this rule lends itself to a superficial interpretation that equates substantial evidence in all cases with evidence that merely supports a finding as more probable than not. Unfortunately courts apply it indiscriminately not only

[3] See Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 220–22 (1957); Estate of Teel, 25 Cal. 2d 520, 527, 530–35, 154 P.2d 384, 387–88, 389–92 (1944); Estate of Bristol, 23 Cal. 2d 221, 223–24, 231–34, 143 P.2d 689, 689–90, 693–95 (1943).

when the burden in the trial court was merely to prove the facts by a preponderance of the evidence, but also when the burden was to prove the facts by clear and convincing evidence, as in fraud cases, or beyond a reasonable doubt, as in criminal cases.[4]

Such distorted applications of the substantial evidence rule frustrate the very distribution of responsibility that the rule is designed to insure. When it is the responsibility of the trier of fact to make a finding on clear and convincing evidence or beyond a reasonable doubt, it becomes the responsibility of the appellate court to test the finding accordingly. In reviewing the evidence it should do more than determine simply whether the trier of fact could reasonably conclude that the alleged fact was more probable than not, as in the ordinary civil case. What the appellate court should determine is whether the trier of fact could reasonably conclude that the alleged fact was highly probable or was, in criminal cases, almost certain. Appellate courts should not absolve themselves of such review even though it requires the most painstaking examination of the evidence and the most subtle reflection as to the probabilities of its persuasiveness to a reasonable trier of fact. Were they to undertake such review there would be hope that a significant number of hard cases would make good law.

Nevertheless such cases continue to make bad law. All too often an appellate court vitiates the applicable rule that a finding must be based on clear and convincing evidence or the applicable rule that a finding must must be established beyond a reasonable doubt, by invoking the rule applicable in the ordinary civil case that there must merely be a preponderance of the evidence. Those who apply the rule indiscriminately are apparently unaware that they thus undermine another rule whose soundness they do not question; ironically, they never voice any opposition to the rule they have undone.

Wittingly or unwittingly, appellate courts at times counteract the distorted applications of the substantial evidence rule by a fulsome use of the prejudicial error rule to pry open the whole record for review. An error is prejudicial, not harmless, if there is credible risk that it influenced the trier of fact to arrive at one finding when there was evidence in the record to support another.

It is more difficult by far to determine whether error is prejudicial than to determine whether evidence is substantial.[5] Once in a while there are fortu-

[4] See Baumgartner v. United States, 322 U.S. 665, 670 (1944); Schneiderman v. United States, 320 U.S. 118 (1943); Beeler v. American Trust Co., 24 Cal. 2d 1, 33, 147 P.2d 583, 600 (1944); Stromerson v. Averill, 22 Cal. 2d 808, 818, 141 P.2d 732, 737 (1943); Susquehanna S.S. Co. v. A. O. Anderson Co., 239 N.Y. 285, 296–97, 146 N.E. 381, 385 (1925). *Cf.* United States v. Castro, 228 F.2d 807, 808–10 (2d Cir.), *cert. denied*, 351 U.S. 940 (1956); United States v. Feinberg, 140 F.2d 592, 594 (2d Cir. 1944). See also MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 182 (1947); McBaine, *Degrees of Belief*, 32 CALIF. L. REV. 242 (1944); McNaughton, *Burden of Production of Evidence: A Function of A Burden of Persuasion*, 68 HARV. L. REV. 1382, 1389–90 (1955); Morgan, *The Law of Evidence* 1941–45, 59 HARV. L. REV. 481, 493–95 (1946).

[5] See Traynor, *supra* note 3, at 222–24.

nately signs to go by. Thus comments or written opinions by a trial judge may reveal the influence of error upon him. Likewise, grossly excessive or inadequate damages may suggest the influence of error upon a jury; conversely, a jury's answer to a special interrogatory may reveal that an error was harmless.

For the most part, however, even with the whole record at hand, an appellate judge has no record of whatever influence error may have exercised on the mental processes of the trier of fact, and he cannot pry open a mind, let alone visualize its past operations. He has nevertheless a responsibility to bring intuition and reasoning to bear on the elusive problem of influence. Were he to shirk doing so, simply affirming any result that he can approve as a reasonable one, he would in effect constitute himself the trier of fact and irrationally attribute to the legitimate trier of fact his own freedom from the influence of the now known error. In thus making his own trial run of the record, instead of undertaking the complex evaluation of what influence error wielded in the original trial run, he might discount error automatically as harmless that on searching reflection he would have adjudged prejudicial.

At the other extreme are those who believe that whenever an appellate judge finds evidence in the record substantial enough to support a judgment contrary to the one reached, he must deem error automatically prejudicial. The argument runs that the influence of error is inscrutable and that were an appellate judge vainly to undertake its evaluation he would be driven to evaluating instead the correctness of the judgment, thereby substituting himself for the trier of fact.

> This beguiling defeatism that would spare a judge his most difficult task is harder to answer. Concededly he is driven in reviewing the whole record, even to weighing the evidence. Nevertheless it is possible for him deliberately to keep in abeyance the question of the correctness of the judgment as he proceeds by inference to adjudge the degree of probability that error influenced the result, which is the focus of his inquiry. In that focus the usual errors—misconduct, erroneous rulings on admissibility of evidence, erroneous instructions—cease to look alike. Some are volatilized by a record so overwhelmingly supporting the result that any other, even though tenable, is reduced to a mere possibility. Some appear tentatively prejudicial at the outset by their very magnitude, and unquestionably so when the evidence supporting the result lacks the magnitude to dissipate them. Some, not of themselves clearly prejudicial or clearly harmless, cast a cloud on the result that compels an inference of prejudice [if likewise they are not dissipated]. . . . An appellate judge, reasoning from imponderables to the probabilities of what has gone on in the minds of others, need not find that it was more probable than not that an error influenced the result to deem it prejudicial. He [should] deem it prejudicial if he finds it not improbable that had it been absent another result would have been reached. Otherwise he would be declaring an error harmless in the face of a substantial chance that it was not, thereby depriving the appellant of the trial to which he was entitled.[6]

[6] *Id.* at 223–24. See Note, *The Harmless Error Reviewed*, 47 COLUM. L. REV. 450 (1947).

There are of course exceptional cases when an appellate judge will call for automatic reversal because of the very nature of the error, regardless of whether it has influenced the result. Such automatic reversal may be necessary to preclude prejudice to the judicial process itself, to the procedural rights of a litigant as well as to his immediate cause or defense. Recurringly an appellate court must thus enforce minimum standards of fairness, sometimes with the objective of securing compliance therewith in future cases.

Unquestionably the vagaries of the influence of error discourage courts from inquiring into it as searchingly as they might. Nevertheless perceptive inquiry disciplines review even as it amplifies it to the advantage of the judicial process. Once again there are rich possibilities that hard cases can make good law.

So far so good. We have seen that a judge can, if he will, apply the substantial evidence rule discerningly enough to insure good law in areas primarily of fact. He can keep a vigilant eye for prejudicial error to insure good law in areas of both law and fact. We come now to his opportunities for making good law in areas primarily of law. The opportunities are abundant particularly because of the accumulated superabundance of law, bad and indifferent as well as good.[7] Ignoring the averages, as we did with the advocates, let us assume a judge who has the will as well as the mind to search through the jumble selectively in the interest of quality control.

He is apt to come upon scholarly studies in the jumble; though too often they are accessories after the facts of another case just different enough from his own to preclude an ideal match. Still, now and again an imaginative judge can find in the work of an imaginative scholar a clue that enables him to assemble some fragments in the jumble constructively and perhaps then to do a slum clearance job on a welter of others that up to then were of problematic survival value.

Even when relevant precedents emerge, a judge can take hope prematurely. No sooner does one line of precedent become clear enough to command attention than another may appear that seems equally impressive. How now, brown cow, when here comes a white one?

Though there is not always so baffling a choice to make, the manifold problem of precedent engenders other difficulties. A judge coming upon a precedent that he might not himself have established will ordinarily feel impelled to follow it to maintain the stability in the law that has value per se. Better the settled precedents that have proved reasonably acceptable and are reasonably in tune with the times than endless re-examinations that create uncertainty without insuring improvement. The serviceable consistency of stare decisis rightly discourages the displacement of precedent, absent overwhelming countervailing considerations.[8] It also rightly discourages specious distinctions that confuse more than they clarify.

[7] See Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615 (1961).

[8] See McKesson v. Lowery, 51 Cal. 2d 660, 664–65, 335 P.2d 662, 664–65 (1959).

There are of course precedents originally so unsatisfactory or grown so unsatisfactory with time as to deserve liquidation. Unfortunately a court often lacks the forthrightness to bring about their demise. Instead it may pursue the unhappy alternatives of keeping them alive and kicking irrationally or of sustaining them half alive. It may blindly follow a sorry precedent only because it lacks the wit or the will or the courage to spell out why the precedent no longer deserves to be followed.

Such dogmatic adherence to the past perpetuates bad law. It is hardly the lesser of two evils to postpone the making of good law by crowding an unfortunate precedent with distinctions instead of retiring it forthwith. It then lingers on, attended by all the little bambini that spit upon its image, leaving counsel puzzled as to how much longer it will linger and how tall the bambini will grow. On the unpredictable retirement date a formal overruling is too often attended by a cavalier pronouncement that the precedent must be deemed to have revealed itself as superannuated in the lengthening shadows of the newcomers. Such a pronouncement comes late to those who had long suspected it was overdue but had still to reckon with the possibility that it might not materialize.

Some troublesome precedents survive with a great show of strength even after they have become riddled with qualifications. They carry their exceptions and reservations like distinctive battle scars and prompt otherwise rational men to honor them, not for their intrinsic worth but for their aspect of continuing glory traceable to what might pejoratively be called the right connections. Such are the precedents that cluster around the concept of sovereign immunity in tort law. Far though we have come from feudal lords and their successors, there are some who still cling to the fantasy of a state like a king that can do no wrong, except perhaps when it descends from its kingly role, whatever that is, to the everyday businesses of life, whatever they are. A concept enjoying the advantage of ancient lineage tinged with royalty and moreover connoting an intimidating Absolute can be awesome to the uncritical. More awesome than it deserves to be, for in its ancient lineage tinged with royalty there is much that is dubious and in its purported Absolute there is little substance to match the sound.[9]

As for the critical, who know sovereign immunity for the arbitrary concept it is and view uneasily the host of arbitrary qualifications that attend it, they are often so dismayed by the extent of the unnecessary evil as to retreat into defeatism. The case law has come to such a state, they are wont to say, that only the legislature can set things aright. Ironically, judges themselves are all too ready to seize on this rationalization to shift to others the responsibility

[9] See Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465 (1961); Racing Comm'n. v. Brush Racing Ass'n., 136 Colo. 279, 316 P.2d 582 (1957); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132–34 (Fla. 1957); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

for redressing judge-made bad law. This is evasion, not mere abstentious avoidance of judicial responsibility. The time is ripe for redress and no one can undertake it more appropriately than the judges themselves. Their inaction speaks louder than words to perpetuate error and confusion.

Were a court to undo well what it has done badly the law would stand to gain much. At best, the legislature might then let well enough alone or advance constructively in the wake of judicial initiative. At worst, the legislature might repudiate the judicial turn for the better. In that event a court would at least have focused attention on a sore problem and could now with good conscience await developments as the legislature henceforth exercised the major responsibility it had pre-empted.[10]

A bad precedent is doubly evil because it has not only wrought hardship but threatens to continue wreaking it. When a judge resolves at last to overrule it, however, he confronts the immediate problem of how much reliance the precedent engendered. Reliance in one case of enormous repercussions? Reliance in many cases of small but cumulatively strong repercussions? No serious reliance at all, in view of the mocking distinctions attending a precedent?

One thing is soon clear to him, whatever else is not, that a bad precedent is easier said than undone. For better or worse, the undoing is a notably difficult aspect of judicial lawmaking. A conscientious judge will seek to make the transition with a minimum of hardship. Unlike a statute, which is normally prospective, an overruling is normally retroactive. A judge is mindful of the traditional antipathy toward retroactive law that springs from its recurring association with injustice and reckons with the possibility that a retroactive overruling could entail substantial hardship. He may nevertheless be impelled to make such an overruling if the hardships it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent under a prospective overruling only.

An immediate consideration will be that statutes of limitation, by putting an end to old causes of action, markedly cut down the number of possible hardship cases. Again, the outworn precedent may be so badly worn that whatever reliance it engendered would hardly be worthy of protection. In some areas of the law, as in torts, it may be unrealistic to assume reliance at all. A person, even a government like a king, does not ordinarily commit or suffer a tort in reliance upon a tort precedent. Reliance seems the more implausible in relation to precedents embodying such concepts as governmental immunity or charitable immunity, which are overripe for overruling. Whatever the hardship a retroactive overruling may impose on a government or a

[10] See ILL. REV. STATS. ch. 122, §§ 821–31 (Supp. 1960), repudiating Molitor v. Kaneland Community Unit Dist., *supra* note 9 and CAL. STATS. 1961, ch. 1404, re-enacting for two years "the doctrine of governmental immunity from tort liability as a rule of decision in the courts of this State. . . ."

charity that has failed to anticipate the risks of litigation by precautionary measures such as insurance, it would hardly outweigh the hardship that its tort has brought to others.

Conversely, a judge might decide, upon weighing the relative hardships, to give only prospective effect to an overruling, following the example in *Great Northern Ry. v. Sunburst Oil & Ref. Co.*[11] It bears noting parenthetically that he might then appropriately make an isolated retroactive application in the instant case so that the very party whose attack on a bad prededent led to its undoing would share in the benefit of the overruling.[12]

An overruling that is prospective only may appear particularly appropriate in such areas of the law as contracts and property, where reliance is apt to count heavily. Sensible though it may be in occasional situations, however, it must make its way against strong resistance. Curiously enough, a judge may at the outset be pulled against upsetting a precedent at all, however bad, because of misgiving engendered by the unfavorable association of an overruling with retroactive law. Once he determines that an overruling can be made prospectively with advantage to the law, he must reckon with the criticism of those who may now recognize the necessity of disowning an old precedent, but who now also insist that its repudiation should establish retroactively the legitimacy of its successor. Such critics cling to the pretense that what has ceased to exist never was. There is in the ancient pretense an estimable yearning for enduring law somehow rising above the errors of those who make it; but it should not ironically serve to thwart the very labors that contribute to the law's enduring acceptance.

A judge who undertakes a timely overruling, whether retroactive or if need be prospective, must bring all of his skill to the task. An irreducible minimum of shock ensues from any notable change in the familiar. It is hard enough to articulate why something new should be added to the law's panorama; it is doubly hard to explain why something familiar should yield to the new. A modicum of sentiment usually persists that the familiar should continue to be supported in the style to which it is accustomed, however insupportable it has become. Here as elsewhere, the more irrational the sentiment, the more vocal it is likely to be. A wise judge can strengthen his overruling against captious objections, first by an exposition of the injustice engendered by the discarded precedent, and then by an articulation of how the injustice resulted from the precedent's failure to mesh with accepted legal principles.[13] When he thus speaks out, his words may serve also to quicken public respect for the law as an instrument of justice.

[11] 287 U.S. 358 (1932). See also Forster Shipbuilding Co. v. County of Los Angeles, 54 Cal. 2d 450, 459, 353 P.2d 736, 741 (1960).

[12] See Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 28, 163 N.E.2d 89, 97 (1959).

[13] See Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 483–85 (1959).

However timely an overruling seems, a judge may still be deterred from undertaking it if there are cogent reasons for leaving the task to the legislature. There are no ready lists of such reasons, and a judge has no absolute standards for testing his own. It is for him nevertheless to articulate the uneasiness he may feel about judicial liquidation of a precedent, however ripe it appears for displacement in the time and circumstances of the case that has brought it into question.

What considerations make it preferable to leave liquidation to the legislature? Sometimes it becomes quickly apparent that if liquidation is to do more good than harm, there must also be construction of new rules of such scope that only the legislature, with its freedom and resources for wholesale inquiry, can effectively formulate them. Professor Wolfgang Friedmann has given us an apt example in contributory negligence, about which judges remain deliberately passive. He notes that "the continuing predominance of contributory, as distinct from comparative, negligence in the great majority of American jurisdictions is assuredly out of tune with elementary principles of fault responsibility, as well as the trends of contemporary legislation." In his view, however, "judicial reform in this field is impossible because a court cannot substitute comparative for contributory negligence without enunciating the principles of apportionment to be applied." He adds that:

> While this perhaps is not too convincing an argument in view of the old judge-made admiralty rules of comparative negligence, a more persuasive obstacle against judicial lawmaking in this field is the fact that the effective carriers of liability are, in the great majority of cases, the insurance companies, and not the nominal parties. Judicial reform would therefore affect the whole complicated—and partly regulated—structure of insurance rates. It would also be difficult for the courts to proceed to the other pole of limiting the imposition of complete liability in accident cases to those involving "gross" negligence—in this writer's opinion a desirable reform—although some rough lawmaking of this kind may occur in jury verdicts.[14]

It is easy to agree that the legislature is preeminently qualified to cope with such problems as contributory negligence. There are many such problems whose resolution entails extensive study or detailed regulation or substantial administration that a court cannot appropriately or effectively undertake. A judge must assume that in the main a legislature will take its share of responsibility for the liquidation of bad law. When a legislature is good, it is apt to be very, very good; though we do well to remember how mysteriously it sometimes moves its wonders not to perform. As Dean Edward Levi reminds us, "Despite much gospel to the contrary, a legislature is not a fact-finding body.

[14] Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821, 841 (1961).

There is no mechanism, as there is with a court, to require the legislature to sift facts and to make a decision about specific situations."[15]

The simple mechanism of the calendar drives a judge to hew, taking care that when the chips are down, they have fallen into the right places. It is hardest to hew to the borderline where the chips must fall gently in place. *Dolce dolce arrivano le complicazioni provocative della rude* borderline.

With troubles enough at the border, I shall not enter here into a differentiation of hard cases involving statutory law from hard cases involving the common law. There are of course differences; but we are concerned here with a major likeness. In both groups of cases competing considerations are of such closely matched strength as to create a dilemma. How can a judge arrive at a decision one way or the other and yet avoid being arbitrary? If he has a high sense of judicial responsibility, he is loath to make an arbitrary choice even of acceptably rational alternatives, for he would thus abdicate the responsibility of judgment when it proved most difficult. He rejects coin-tossing, though it would make a great show of neutrality. Then what?

He is painfully aware that a decision will not be saved from being arbitrary merely because he is disinterested. He knows well enough that one entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception. Disinterest, however, even disinterest envisaged on a higher plane than the emotional, is only the minimum qualification of a judge for his job. Then what more?

He comes to realize how essential it is also that he be intellectually interested in a rational outcome. He cannot remain disoriented forever, his mind suspended between alternative passable solutions. Rather than taking the easy way out via one or the other, he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and to spell out why. In the course of doing so he channels his interest in a rational outcome into an interest in a particular result. In that limited sense he becomes result-oriented.[16] Would we want it otherwise? Would we give up the value judgment for the non-commitment of the two-faced coin?[17]

[15] LEVI, AN INTRODUCTION TO LEGAL REASONING 22 (1948).

[16] In that limited sense, *result-oriented* connotes no more than the final steps toward reasoned judgment. See Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 91–94 (1960).

[17] See Traynor, Comment on paper by Charles D. Breitel entitled The Courts and Lawmaking in Legal Institutions Today and Tomorrow, 51–52 (Paulsen ed. 1959); Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 166 (1960).

A judge's troubled quest for the rational outcome of a hard case involves in the main professional skill, his legal reasoning and legal imagination. When at last he reaches a juncture where he feels bound to commit himself to one value judgment or another, the intellectual quest merges with a yearning for something more than the mere orderly disposition of problems, a yearning often approximately defined as a sense of justice and culminating in what Edmond Cahn calls *The Moral Decision.*[18] There can be little question that such a decision, deeply reflected as it is, stands to make law of a higher quality than the amoral decision. We should be aware of how difficult it is to come by. As Harry Jones sensitively observes, "just decision requires both an intellect that perceives the good and a will that resolutely perseveres in the good course intellectually perceived."[19] The old proverb that when there's a will there's a way is reversed. The judge must first find the way and then summon the will.

Given that a hard case lifts judicial responsibility from routine conscientiousness to a search for the X factor that will make possible a reasoned rather than a chance decision, there remains the question of where to begin and end the search. What resources available to a judge should he mobilize and how best can he utilize them to light up the dark problems whose analogy to past cases is anything but sharp and whose intimation of the future is anything but clear?

Sometimes all the pertinent data emerge from the briefs and whatever supplementary research they prompt him to do. In the context of these he can search out the decisive X-value judgment.

Sometimes it becomes clear to the judge—and it is the only thing that is clear to him at this point—that he cannot make an informed decision without more information beyond the immediate facts about the parties. It is no longer heresy to suggest that he should seek to make an informed decision if possible, of course by procedures that insure fairness to the parties and are in keeping with orderly judicial review. Fortunately we now have the benefit of a landmark study that suggests such procedures. We find in Kenneth Davis' great *Administrative Law Treatise* fresh insights on such matters as judicial notice, fresh concepts such as *legislative facts.*[20] Other scholars are now also at work on tentative standards that even as they keep judicial inquiry focused as it traditionally has been on the settlement of controversy, will afford the judge

[18] CAHN, THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW (1955). See also Cahn, *The Consumers of Injustice*, 34 N.Y.U.L. REV. 1166 (1959); Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955); Cahn, *Jurisprudence*, 31 N.Y.U.L. REV. 182 (1956).

[19] Jones, *Law and Mortality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 809 (1961).

[20] § 15.03 (1958). See also Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942); Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955).

useful guidance in tapping relevantly the legislative facts to illuminate the controversy and hence his decision.[21]

It is one of the high challenges of *la dolce e rude vita* to transform hard cases into good law. If I have leavened this earnest commentary in the language of our common law country with a few phrases from the language of a civil law country, it was only to signify lightly the familiar phenomenon I noted at the outset, our transition from many small worlds to one. Things happen fast in our small world and we who tend the law must keep pace. As the old saying goes, "When in Rome . . . ." Of course, as befits our profession, we will bring to the quickened pace the sobering reflection that *Roma non fu fatta in un giorno*. The law will never be built in a day, and with luck it will never be finished.

[21] Baade, *Social Science Evidence and the Federal Constitutional Court of West Germany*, 23 JOURNAL OF POLITICS 421 (1961); G.R.Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39; Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey and Criticism*, 66 YALE L.J. 319 (1957); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215 (1961); Newman, *Some Facts on Fact-Finding by an Investigatory Commission*, 13 AD. L. REV. 120 (1960–61).